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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. GALAREKA HARRISON, Appellant.	2 CA-CR 2008-0407 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20073484

Honorable Nanette M. Warner, Judge

AFFIRMED

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E C K E R S T R O M, Presiding Judge.

¶1 Appellant Galareka Harrison was convicted after a jury trial of first-degree murder, taking the identity of another, and three counts of forgery. The trial court sentenced her to imprisonment for natural life for murder and imposed lesser, concurrent sentences for forgery and identity theft. She argues the court erred when it denied her pretrial suppression motion and motions for change of venue, denied her motions to strike three jurors for cause, and instructed the jurors on reasonable doubt. She contends she was entitled to a mistrial based on the court's improper instructions to the prospective jurors and the state's misconduct. Finally, she argues she should be resentenced based on the court's erroneous imposition of a natural-life term of imprisonment.

Factual and Procedural Background

¶2 Harrison and the victim, Mia H., were first-year students and roommates at the University of Arizona in the fall of 2007. They lived together in a dormitory as part of a program to help Native American students make the transition into the university environment. A few weeks after the beginning of the term, Mia called university police to report that some of her personal belongings had been stolen. She suspected Harrison was responsible, and Harrison confessed to taking the items during an interview with a university police officer.

¶3 About a week later, early in the morning of September 5, 2007, Harrison stabbed Mia multiple times, inflicting fatal injuries. After an interview with university police detectives in which she admitted stabbing Mia but claimed she had acted defensively, Harrison was arrested and charged with first-degree murder and other crimes

related to her theft of Mia's belongings. A jury found Harrison guilty of all the charges, and she filed this timely appeal following her sentencing.

Juror Strikes

¶4 Harrison argues the trial court erred when it denied her motion to strike three prospective jurors for cause; jurors numbered 31, 36, and 106. We review for an abuse of discretion a trial court's denial of a motion to strike a potential juror for cause. *State v. Cruz*, 218 Ariz. 149, ¶ 28, 181 P.3d 196, 205 (2008). Harrison questioned the three jurors' impartiality because all three were equivocal in response to the court's questions about their ability to decide the case fairly and impartially. After the completion of voir dire, and after the court had denied Harrison's motion to strike jurors numbered 31 and 36 for cause, she used peremptory strikes to remove them from the panel. "Even if a defendant is forced to use a peremptory challenge to remove a juror who should have been excused for cause, however, an otherwise valid criminal conviction will not be reversed unless prejudice is shown." *Id.*; *accord United States v. Martinez-Salazar*, 528 U.S. 304, 317 (2000); *State v. Hickman*, 205 Ariz. 192, ¶¶ 28-29, 68 P.3d 418, 424-25 (2003).

¶5 Although our review of the record supports the state's assertion that the trial court did not abuse its discretion in refusing to strike either juror 31 or 36, we need not decide that question because Harrison used her peremptory strikes on those jurors and she has not shown she was deprived of a trial by a fair and impartial jury. *See State v. Garza*, 216 Ariz. 56, ¶ 32, 163 P.3d 1006, 1015 (2007) (no reversal required when

defendant used peremptory strikes to remove jurors previously challenged for cause and defendant did not show "the jury eventually empanelled . . . was not impartial").

¶6 Of the three jurors Harrison challenges, only juror 106 actually sat on the jury that decided her guilt. As part of jury selection, potential jurors had been given a preliminary questionnaire before the voir dire process. In response to the questions, juror 106 stated Harrison was "probably guilty, seems like they have a lot of evidence," but said she could set that opinion aside. When questioned by the trial court and counsel during voir dire, she assured the court there was no doubt in her mind she could base her decision only on the evidence presented in court. Juror 106 stated she had also discussed the killing with her coworkers when stories about it had appeared in the local news. But she again assured the court she had no doubt she could disregard those prior conversations and decide the case based on the evidence presented.

¶7 The trial court asked juror 106, "[I]f you were in Ms. Harrison's shoes, she should be comfortable with your mindset?" She responded, "She might. She would be more comfortable with someone else." However, after further questioning, she then assured the court twice more that she could follow the law and set aside what she had learned about the case from media reports.

¶8 Juror 106 repeatedly assured the trial court she could serve fairly and impartially. And we defer to the court's "opportunity to see and hear her speak." *State v. Smith*, 182 Ariz. 113, 115, 893 P.2d 764, 766 (App. 1995). As long as a juror agrees to decide the case only on the evidence presented at trial, "[e]ven a juror with preconceived notions about the defendant's guilt need not be excused." *State v. Anderson*, 210 Ariz.

327, ¶ 28, 111 P.3d 369, 380 (2005). "A juror's statement of impartiality need not be couched in absolute terms to assure the trial court of the juror's fitness to sit on the jury." *State v. George*, 206 Ariz. 436, ¶ 19, 79 P.3d 1050, 1058 (App. 2003). The court did not abuse its discretion in denying Harrison's motion to strike juror 106 for cause.

Change of Venue

¶9 Harrison argues the trial court erred in denying her motions for a change of venue based on prejudicial pretrial publicity. "We will not overturn a trial court's ruling on a motion for change of venue due to prejudicial pretrial publicity absent an abuse of discretion and prejudice to the defendant." *State v. Nordstrom*, 200 Ariz. 229, ¶ 14, 25 P.3d 717, 727 (2001).

¶10 Because of the amount of publicity the case had generated, the trial court ordered the 150 prospective jurors to come to court for a "meet and greet" three weeks before trial. The court advised them of the charges Harrison was facing and of her plea of not guilty. It instructed them to fill out a questionnaire that would be used "to ensure . . . the jury . . . chosen to hear th[e] case will be fair and impartial and keep an open mind throughout the entire trial."

¶11 Shortly thereafter, Harrison moved for a change of venue, arguing that "[t]he significant number of jurors convinced of Ms. Harrison's guilt based upon responses to the questionnaire demonstrates the actual prejudice caused by the extensive media coverage." She contended over one-third of the respondents had decided Harrison was guilty based on news coverage of the incident. Further, she asserted, "The number of impaired jurors exceeds one-half of the panel when those requiring a defendant to testify

or believing that one who does not testify is probably guilty are added to those who have concluded Ms. Harrison is guilty based upon media coverage."[1] The court denied the motion, concluding the level of pretrial publicity did not require a change of venue.

¶12 Based on an article printed in a local newspaper a few days before jury selection was to begin, Harrison renewed her change-of-venue motion. However, when the prospective jurors were asked during jury selection if any had read the article, none responded affirmatively, although two indicated they had glanced at the headline. The trial court denied the renewed motion, finding a fair and impartial jury could be empaneled from the remaining venirepersons.

¶13 "The analysis of pretrial publicity involves two inquiries: '(1) Did the publicity pervade the court proceedings to the extent that prejudice can be presumed? If not, then (2) did defendant show actual prejudice among members of the jury?'" *State v. Cruz*, 218 Ariz. 149, ¶ 14, 181 P.3d 196, 203 (2008), *quoting State v. Murray*, 184 Ariz. 9, 26, 906 P.2d 542, 559 (1995). Harrison concedes the pretrial publicity in her case does not allow us to presume prejudice. *See Nordstrom*, 200 Ariz. 229, ¶ 15, 25 P.3d at 727 (prejudice presumed "when publicity is so unfair, pervasive, and prejudicial that the court cannot give credibility to the jurors' attestations, during voir dire, that they could decide fairly"). Thus, the only relevant inquiry is whether Harrison has shown actual prejudice

[1]Our search of the record on appeal reveals we have not been provided the completed questionnaires. It was Harrison's responsibility to ensure the record contains all documents necessary to decide the issues she raises on appeal. *See State v. Zuck*, 134 Ariz. 509, 512-13, 658 P.2d 162, 165-66 (1982). But, even assuming Harrison's calculations are supported by the questionnaires themselves, the trial court did not abuse its discretion in finding those calculations do not prove actual prejudice here.

among the jurors. *See Cruz*, 218 Ariz. 149, ¶¶ 14, 21, 181 P.3d at 203-04 (defendant's burden to show prejudice); *Murray*, 184 Ariz. at 26, 906 P.2d at 559 (same).

¶14 To determine if actual prejudice justified a change of venue, we examine whether the pretrial publicity affected the objectivity of the jurors. *Nordstrom*, 200 Ariz. 229, ¶ 18, 25 P.3d at 728. "A defendant 'must show that the jurors have formed preconceived notions concerning the defendant's guilt and that they cannot lay those notions aside.'" *Id*., *quoting State v. Chaney*, 141 Ariz. 295, 302, 686 P.2d 1265, 1272 (1984). Harrison contends the responses to the questionnaire prove media exposure in her case caused actual prejudice among the jurors. But in *Cruz*, the defendant had presented similar potential-juror polling data showing that fifty-one percent of seventy-nine potential jurors who had heard about the case thought Cruz was guilty. 218 Ariz. 149, ¶¶ 19, 22, 181 P.3d at 204, 205. Nonetheless, our supreme court found such data insufficient to show actual prejudice justifying relief. *Id.* ¶ 22.

¶15 Harrison emphasizes that, unlike in *Cruz*, where the poll was conducted one year before the trial, *id.* ¶ 20, the potential jurors here submitted the questionnaires under oath and close in time to the trial date. But we find that distinction immaterial to the question whether there was actual prejudice among the jurors who decided Harrison's case. Here, the questionnaire and voir dire together extensively addressed Harrison's pretrial publicity concerns in order to eliminate jurors who could not be fair and impartial and, as discussed above, Harrison has not shown that the jurors who ultimately deliberated were biased, partial, or unfair. Moreover, throughout the case, the court warned the jury to avoid media coverage of the trial.

¶16 Under similar circumstances, our supreme court has held defendants failed to show actual prejudice among the jurors. *E.g.*, *Cruz*, 218 Ariz. 149, ¶ 22, 181 P.3d at 205 (defendant did not show actual prejudice when court held extensive and lengthy voir dire, including individual questioning of each potential juror, "to weed out potentially biased jurors"); *Murray*, 184 Ariz. at 26, 906 P.2d at 559 (despite some prospective jurors' having heard about case, defendants failed to show actual prejudice when jury questionnaire and voir dire thoroughly covered publicity, only prospective jurors who assured court of fairness and impartiality remained on panel, and court repeatedly advised empaneled jurors to avoid news coverage of trial). We conclude Harrison has not shown actual prejudice from the pretrial publicity in her case and the trial court did not abuse its discretion when it denied her requests for a change of venue.

Cross-Section of Community

¶17 Harrison also argues the jury that decided her case was not composed of a fair cross-section of the community because it excluded an entire group—"those who read newspapers or watch television news." "To succeed on a claim that underrepresentation in a particular case violated the [S]ixth [A]mendment fair cross-section requirement, defendant must make a prima facie showing that (1) the group alleged to be excluded is a 'distinctive' group in the community; (2) the representation of the group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) this underrepresentation is due to systematic exclusion of the group in the jury selection process." *State v. Atwood*, 171 Ariz. 576, 621, 832 P.2d 593, 638 (1992), *overruled on other grounds by State v.*

Nordstrom, 200 Ariz. 229, 25 P.3d 717 (2001); *accord State v. Morris*, 215 Ariz. 324, ¶ 40, 160 P.3d 203, 213 (2007). We review constitutional questions de novo.[2] *See State v. Ellison*, 213 Ariz. 116, ¶ 42, 140 P.3d 899, 912 (2006).

¶18 First, we note Harrison provides no factual support for her contention that the jury did not include people who generally follow the local news. Second, even if her premise is taken as true, at most her argument tends to show that news watchers are systematically excluded from juries in cases that garner local or national news coverage and not from all juries.

¶19 Finally, Harrison has not shown that people who generally follow the news constitute a distinct group for purposes of a Sixth Amendment claim of a fair-cross-section violation. Although she suggests in her reply brief that the United States Supreme Court has not defined clearly what makes a group distinctive in the community for the Sixth Amendment analysis, we find ample guidance in Supreme Court jurisprudence and the case law interpreting it. *See Thiel v. S. Pac. Co.*, 328 U.S. 217, 220, 221, 224-25 (1946) (stating prospective jurors must be selected "without systematic and intentional exclusion" of any "economic, social, religious, racial, political and geographical groups of the community," holding court officials' exclusion of daily-wage workers from jury lists required trial court to strike panel); *United States v. Potter*, 552 F.2d 901, 905 (9th Cir. 1977) (rejecting contention less-educated persons constitute cognizable group, because they "are a diverse group, lacking in distinctive characteristics

[2]The trial court implicitly found Harrison had not met her burden on this claim when it denied her first motion for change of venue.

or attitudes which set them apart from the rest of society" and "are of varying economic backgrounds, and races, and of many different ages"), *disapproved on other grounds by United States v. Brady*, 579 F.2d 1121 (9th Cir. 1978); *United States v. Abell*, 552 F. Supp. 316, 322-24 (D. Me. 1982) (finding defendants had not shown lower socioeconomic class cognizable group because no proof group shared particular "'attitudes or ideas or experience'"); *Atwood*, 171 Ariz. at 623, 832 P.2d at 640 (finding people whose employers do not compensate for jury duty not distinct group because lacking cohesion or "'basic similarity in attitudes or experiences'"). In short, to constitute a distinct group in the community, at a minimum a group must be identifiable, cohesive, and recognized as a group by the community. *See Atwood*, 171 Ariz. at 622-23, 832 P.2d at 639-40; *see also United States v. Guzman*, 337 F. Supp. 140, 143 (S.D.N.Y. 1972) ("A cognizable group is not one whose membership shifts from day to day or whose members can be arbitrarily selected."). Because Harrison has not shown that "those who read newspapers or watch television news" have the characteristics of a distinct group, we conclude the composition of her jury did not violate her Sixth Amendment right to a jury composed of a fair cross-section of the community.

Reasonable Doubt Instruction

¶20 Harrison contends the reasonable doubt instruction the trial court gave pursuant to *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995), constituted structural error that lessened the state's burden of proof and shifted it to her, thereby violating her rights guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution as well as by article II, §§ 4 and 24 of the Arizona Constitution. She also

contends the instruction "increased the quantum of evidence needed to acquit" and "erroneously and confusingly referenced different standards of proof that apply to civil and criminal cases."[3]

¶21 As Harrison concedes, our supreme court has rejected constitutional challenges to *Portillo*'s language. *E.g.*, *State v. Dann*, 220 Ariz. 351, ¶ 65, 207 P.3d 604, 618 (2009); *State v. Garza*, 216 Ariz. 56, ¶ 45, 163 P.3d 1006, 1016-17 (2007); *State v. Ellison*, 213 Ariz. 116, ¶ 63, 140 P.3d 899, 916 (2006). We are not at liberty to overrule or disregard that court's rulings, *State v. Foster*, 199 Ariz. 39, n.1, 13 P.3d 781, 783 n.1 (App. 2000), and therefore do not consider this argument further.

Mistrial Based on Court's Instructions

¶22 Harrison argues the trial court erred in denying her motion for a mistrial based on the court's instructions to the prospective jurors on the presumption of innocence and reasonable doubt. We review a trial court's denial of a motion for mistrial for an abuse of discretion. *State v. Jones*, 197 Ariz. 290, ¶ 32, 4 P.3d 345, 359 (2000). "A declaration of a mistrial . . . is 'the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted.'" *State v. Dann*, 205 Ariz. 557, ¶ 43, 74 P.3d 231, 244 (2003), *quoting State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983). Harrison also contends the court so undermined the presumption of innocence that the jury's verdict

[3]Harrison notes that her argument is set forth "to preserve this issue for any potential future and/or federal claims."

could not have been "obtained within the meaning of the Sixth Amendment," a constitutional question to be reviewed de novo. *See State v. Ellison*, 213 Ariz. 116, ¶ 42, 140 P.3d 899, 912 (2006).

¶23 As jury selection began, the trial court explained to the prospective jurors that the charges against Harrison were not evidence and asked whether any of them would have difficulty presuming Harrison innocent despite the charges against her. None of the jurors responded, and the court continued:

> I know that is kind of—kind of a goofy concept. You are thinking, why would she be here if she is innocent, but that's the way our system works. People get arrested, people get charged, innocent people get arrested, innocent people get charged, and that presumption of innocence is part—is the foundation of our criminal justice system, and I must have a jury that can believe that Ms. Harrison, as she sits here, is innocent of the charges and she remains innocent unless you are convinced beyond a reasonable doubt by evidence that the State produces that she is guilty of any of the charges. Anybody who struggles with that? Any problem?

None of the jurors responded.

¶24 After a further instruction about deciding the case based only on the evidence presented, the court stated it would "instruct [them] that [they] must apply the law whether [they] agree with it or not" and would give them "very technical definitions of the law." Finally, the court explained to the prospective jurors:

> Beyond a reasonable doubt doesn't mean beyond all doubt, beyond a shadow of doubt. . . . [S]o don't think it is like it has to be beyond a reasonable doubt of conceivable reason, that it could possibly be such as well. Maybe in [sic] some space aliens that intervened, and that's . . . an exaggeration, but I want to make sure that you understand that it is going to be

> beyond a reasonable doubt and I will give you the instruction on that.

¶25 The next morning, Harrison moved for a mistrial. She argued the trial court's characterization of the presumption of innocence as a "goofy concept" and the court's explanation of the reasonable doubt standard involving "space aliens" undermined or trivialized the concepts and did "incalculable harm to [her] due process rights under the federal and state constitutions." Harrison also complained about the court's use of the phrase "technical definitions of the law," arguing jurors have preconceived notions about "lawyers exploiting technicalities, defendants being released on technicalities, and the system not working because of technicalities." She contended the cumulative effect of the court's statements created in the jurors "a mindset that is not the mindset that they should have as this trial begins" and argued a mistrial was the only remedy.

¶26 The trial court denied the motion for mistrial, concluding there had been "innumerable times [it had] emphasized the defendant's innocence." The court also reminded counsel it had informed jurors it "would give them a lengthy instruction on reasonable doubt." The court concluded: "Seeing the response of the jurors on individual voir dire, the Court does not believe that the use of some terminology by the Court in the voir dire to the panel as a whole has resulted in a kind of prejudice that . . . would warrant a mistrial, and therefore I will deny the motion for mistrial." The state added that, based on some confused responses to the questionnaire the prospective jurors had filled out, "any explanation that the Court gave in regards to the defendant's

innocence, or defendant's rights, were helping the jury, getting the jury to understand the concept."

¶27 Harrison concedes that "[n]othing in the written jury instructions, read verbatim by the trial court, conflicted with Arizona case law." She contends, however, that "extraneous comments from the court to the venire panel before the trial began, particularly that the presumption of innocence is a 'goofy concept,' served to undermine all the instructions that would later be read." She contends that, because of the court's instructions "that the presumption of innocen[ce] is 'goofy' and 'technical,' [the jury] did not render a verdict within the meaning of the Sixth Amendment." She relies for support solely on *Sullivan v. Louisiana*, 508 U.S. 275, 277, 280-82 (1993), in which the court held it was structural error to have given an instruction that equated reasonable doubt with "grave uncertainty" and "actual or *substantial doubt*" and required jurors to have "moral certainty" of the defendant's guilt, thereby seemingly requiring a lesser degree of proof than that required by the Fifth and Sixth Amendments.[4]

¶28 As previously noted, Harrison was given the instruction on reasonable doubt approved by our supreme court. The trial court's extraneous comments were not part of any actual instruction, thereby plainly distinguishing this case from *Sullivan*. And, although we agree that the court's remarks were perhaps ill considered and that trial courts should be careful not to deviate from the carefully chosen words of judicially approved instructions when explaining reasonable doubt, Harrison has not shown the

[4]Although the Supreme Court did not quote the pertinent language of the defective instruction in its opinion, the specific language appeared in *State v. Sullivan*, 596 So. 2d 177, 185 n.3 (La. 1992), which the Supreme Court cited. *Sullivan*, 508 U.S. at 277.

court's remarks to the prospective jurors caused any empaneled juror to disregard its final jury instructions. *See Whitson v. State*, 65 Ariz. 395, 398, 181 P.2d 822, 823 (1947) (no error in court's comments to venire panel that failed to "precisely define all essential elements of [the] offense" when "law describing and governing the[] offenses was fully and correctly declared" in court's final instructions to jury); *see also State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006) (presuming jurors follow court's instructions).

¶29 In context, the trial court's statements during voir dire seem to have been a misguided effort to ensure the jurors selected would be willing to abide by and apply the presumption of innocence. Harrison's assertion the jury was tainted by the comments is belied by the lack of any affirmative response to the court's question whether the jurors would be unable to presume her innocent. Harrison has not shown she was entitled to a mistrial, and we find no abuse of discretion in the court's denial of her motion. Nor do we find a violation of the Sixth Amendment.

Motion to Suppress

¶30 Harrison argues the trial court erred when it denied her motion to suppress the statements she had made to law enforcement officers in an interview at the hospital. Specifically, she contends that some "extraneous comments" made by the detective while he read her the *Miranda*[5] warnings invalidated them. When examining a ruling on a motion to suppress, we consider only the evidence presented at the suppression hearing, viewing it in the light most favorable to sustaining the trial court's findings. *State v.*

[5]*Miranda v. Arizona*, 384 U.S. 436 (1966).

Esser, 205 Ariz. 320, ¶ 3, 70 P.3d 449, 451 (App. 2003). And, because Harrison challenged only the voluntariness of her statements below and not the validity of the *Miranda* warnings, we review the latter issue only for fundamental error and resulting prejudice.[6] *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005) (when defendant fails to make argument in trial court, appellate review for fundamental error and resulting prejudice only); *see also State v. Montes*, 136 Ariz. 491, 494, 667 P.2d 191, 194 (1983) ("Voluntariness and *Miranda* are two separate inquiries.").

¶31 "To satisfy *Miranda*, the state must show that appellant understood h[er] rights and intelligently and knowingly relinquished those rights before custodial interrogation began." *State v. Tapia*, 159 Ariz. 284, 286-87, 767 P.2d 5, 7-8 (1988). The trial court's determination is case-specific and focuses on such factors as "the defendant's background, experience and conduct." *Montes*, 136 Ariz. at 495, 667 P.2d at 195.

¶32 About one week before Mia's death, University of Arizona police officer Timothy Lopez was called to a dormitory in response to a theft report made by Mia. Because Harrison was suspected of committing the theft, Lopez asked her to speak with him. At a private location, Lopez read her the *Miranda* warnings, and Harrison stated she understood her rights and would speak to him. She told Lopez she had taken items from Mia and had "purchased items and used [Mia]'s Cat Card"—her university identification

[6]Harrison also appears to have abandoned her voluntariness argument on appeal. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (failure to develop argument waives claim on appeal); *see also State v. Aleman*, 210 Ariz. 232, ¶ 9, 109 P.3d 571, 575 (App. 2005) (issues raised for first time in reply brief waived).

that also functioned as a debit card—to make purchases at the university bookstore. She then admitted having stolen several checks and another student's identification, and she took Lopez to her dormitory room where she gave him some of the items she had stolen as well as some items she had purchased with the stolen Cat Card and checks. Lopez testified that, during the conversation, Harrison had responded appropriately to his questions and had appeared to understand "what [he] was there for and the potential consequences."

¶33 A little more than a week later, Harrison stabbed Mia to death during an altercation. Harrison received some superficial wounds and a deep cut on her leg, and she was transported to the hospital for treatment. University detectives Martin Ramirez and Mario Leon interviewed Harrison in her hospital room. First, Ramirez read Harrison the *Miranda* warnings and asked Harrison her age. When she said she was eighteen years old, Ramirez stated, "So you're not a juvenile, okay, so that doesn't apply. Okay, so do you understand these rights?" Harrison nodded her head affirmatively and replied, "Um, hum." Ramirez then stated, "Pretty plain and simple? Okay," and proceeded to ask Harrison preliminary, biographical questions.

¶34 After obtaining the general background information, Leon stated, "Okay. Before we really ask any, are you feeling okay, or I mean, or they, they took care of you. I know you had that cut on your leg. I'm just making sure you're not, are you in pain or anything right now, or[—]?" Harrison replied, "It kind of hurts." Leon confirmed that response and then asked, "The medication is wearing off a little bit?" Harrison replied, "Yeah." Ramirez then told Harrison his grandmother's theory that a little bit of pain was

good because it meant the injury was healing. Leon asked, "But um, if you can[,] do you mind just sitting here and telling us what, what happened, just go from there?" Harrison stated, "Okay," and began to tell a version of the story to the detectives.

¶35 The detectives testified that, throughout the interview, Harrison's demeanor was calm with some intermittent crying that did not last long; she was cooperative and gave appropriate responses to all the questions, never asked for a lawyer, and was not in handcuffs during the interview. The detectives allowed her to take a bathroom break, and she got a drink when she went to the restroom. After she was arrested and taken to the police station, the detectives conducted two additional interviews, each lasting only about four minutes. During those brief interviews, Harrison never indicated any reluctance to answer the detectives' questions. She never again mentioned being in pain. At the very end of the last interview, Harrison said she was cold, and Leon gave her a blanket, although he conceded the blanket he had given her "really [wa]sn't much of a blanket." At one point, Leon told Harrison she needed to be truthful, but the officers made no threats or promises at any time during the interviews. The trial court found that, under the totality of the circumstances, Harrison's statements had been voluntary.

¶36 In the case Harrison relies on, *United States v. Connell*, 869 F.2d 1349, 1350-51, 1353 (9th Cir. 1989), the defendant was given two different versions of the *Miranda* warnings; one stated if he could not afford a lawyer, one *might* be appointed to represent him. That, and the "strong assertion" in both warnings that the defendant was responsible for obtaining an attorney's services, rendered the *Miranda* warnings in that case insufficient "to apprise him of his right to appointed counsel." *Connell*, 869 F.2d at

1350, 1353. But *Connell* is easily distinguishable. Here, the warnings themselves were clearly sufficient. And Harrison has provided no additional authority to support her position. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (appellant must develop and support argument).

¶37 Although Harrison is correct that one possible interpretation of the officer's remark is that the *Miranda* warnings he had just read to her actually did not apply because she was no longer a juvenile. But the same remark also clearly could have been understood by Harrison to mean exactly what the officer intended—that he did not need to read additional advisories pertinent only to juveniles. And the record supports the conclusion that Harrison had fully understood her rights pursuant to *Miranda*.

¶38 About a week before the murder, a university police officer had read her the *Miranda* warnings, which she waived after indicating she understood them and then admitted she had stolen items from the victim and another student. As the state points out, Harrison never has challenged the admissibility of those statements and, thus, never has disputed she understood her rights before making those statements. When she was then read the *Miranda* warnings again at the hospital, she again acknowledged she understood them. *See Tapia*, 159 Ariz. at 287, 767 P.2d at 8 (*Miranda* satisfied when appellant "advised and reminded" of rights at least four times and each time "acknowledged he understood," did not take advantage of "ample opportunity to ask questions and clarify anything he did not understand," but rather "freely answered questions, never attempted to terminate questioning and never asked for a lawyer").

¶39 Although Harrison contends cultural differences between her and the officer reading the *Miranda* warnings invalidated her waiver of her rights, we find no support for that contention in the record. Harrison claims "her ability to talk about concrete things [in English] does not allow for the inference that she also understood abstract concepts such as *Miranda* rights in English." But she never squarely contends she did not understand the *Miranda* warnings in English. Moreover, although Harrison alleges she had neither lived in a city before nor traveled often and, thus, the transition to university life was particularly awkward, she provides no support for the contention these facts rendered her unable to understand the *Miranda* warnings as read to her in English. In short, Harrison has not shown anything about her Native American background in particular that invalidates or undermines the *Miranda* warnings in these circumstances.[7] *Cf. State v. Rivera*, 152 Ariz. 507, 513, 733 P.2d 1090, 1096 (1987) (Mexican citizen unfamiliar with criminal process in United States held to have understood *Miranda* warnings and waived rights).

¶40 The record also supports the conclusion Harrison waived her rights pursuant to *Miranda*. A suspect can waive her Fifth and Sixth Amendment rights after being read the *Miranda* warnings either by waiving them expressly or by her conduct. *Montes*, 136 Ariz. at 493, 495, 667 P.2d at 193, 195. It is undisputed Harrison did not

[7]Although on appeal Harrison relies on a decision by the Navajo Supreme Court setting forth a distinct version of *Miranda* warnings applicable in tribal court, she conceded below that the decision is not binding on Arizona state courts. Moreover, her trial counsel stated he was offering the case to the court as guidance on the issue of voluntariness, and nothing in the record indicates the trial court did not consider this information in making its voluntariness finding. *See State v. Medrano*, 185 Ariz. 192, 196, 914 P.2d 225, 229 (1996) (we presume trial court knows and follows law).

waive her rights expressly. Rather, one of the detectives asked if she would "mind" telling them what had happened, and she proceeded to talk.

¶41 Harrison contends the waiver-by-conduct doctrine does not apply here because in one case, *State v. Hein*, 138 Ariz. 360, 366, 674 P.2d 1358, 1364 (1983), the defendant signed a waiver form in addition to implicitly waiving his rights by answering questions and in another case, *State v. Prince*, 160 Ariz. 268, 772 P.2d 1121 (1989), "the Supreme Court did not state any facts that could clarify its application." She also contends her case is distinguishable from relevant authority because "[n]one of those cases where waiver is implied by conduct involve[s] an insufficient reading of *Miranda* in the first place." However, we have determined the detective's reading of *Miranda* was constitutionally sufficient; accordingly, this argument fails. *Hein* and *Prince*—the cases she criticizes—are not the only pertinent waiver-by-conduct cases. *See, e.g.*, *State v. Knapp*, 114 Ariz. 531, 538, 562 P.2d 704, 711 (1977) (waiver by conduct applied when defendant answered questions after *Miranda* advisory); *State v. Pineda*, 110 Ariz. 342, 344-45, 519 P.2d 41, 43-44 (1974) (same). And Harrison has not meaningfully distinguished *Hein* and *Prince* in any event.

¶42 Importantly, when determining the validity of a waiver, courts may consider a suspect's prior exposure to the *Miranda* warnings. *E.g.*, *Tapia*, 159 Ariz. at 287, 767 P.2d at 8. As discussed above, Harrison had been read the *Miranda* warnings only one week before the murder. At that time, she waived her rights and proceeded to give incriminating information to the university police. She has not challenged her waiver of her rights on that occasion and has not shown that any material intervening

circumstances rendered her subsequent waiver invalid. We find ample evidence that law enforcement officers had informed Harrison properly of her *Miranda* rights and that she knowingly and intelligently had waived her rights so as to render her confessions admissible. We find no error, fundamental or otherwise.

Mistrial Based on Burden Shifting

¶43 Harrison argues the trial court erred in denying her motion for mistrial based on the state's improper questioning of one of its witnesses. As noted above, we review a trial court's denial of a motion for mistrial for an abuse of discretion. *State v. Jones*, 197 Ariz. 290, ¶ 32, 4 P.3d 345, 359 (2000). At trial, Harrison cross-examined two of the state's witnesses about the state's failure to test certain items of evidence found at the scene for identifying characteristics and repeatedly suggested such testing should have been conducted. On redirect examination, the state asked one of those witnesses if that evidence had been available for the defense to test, and the witness replied it had been. Harrison immediately moved for a mistrial, arguing the state's question unconstitutionally had shifted the burden of proof to her. After argument, the trial court denied the motion. In its final instructions to the jury, the court stated:

> The law does not require a defendant to prove his or her innocence. A defendant is presumed by law to be innocent. You must start with the presumption that the defendant is innocent.
>
> The State must prove guilt beyond a reasonable doubt based on evidence that it produces at trial. The burden never shifts throughout the trial. This means the State must prove each element of the charge beyond a reasonable doubt. The defendant is not required to produce evidence of any kind or to perform any testing. The decision on whether to produce

> any evidence is left to the defendant, acting with the advice of an attorney. The defendant's decision not to produce any evidence is not evidence of guilt.

¶44 Harrison now contends, as she did below, that the trial court's ruling effectively shifted the burden of proof to the defense "because the State was being relieved of its affirmative duty to present evidence by informing the jury that the defense was able to conduct independent tests." However, the state was entitled to rebut Harrison's implicit suggestion to the jury that the untested items of evidence had exculpatory value by clarifying that the defense also could have tested the items. *See State ex rel. McDougall v. Corcoran*, 153 Ariz. 157, 160, 735 P.2d 767, 770 (1987); *State v. Edmisten*, 220 Ariz. 517, ¶ 26, 207 P.3d 770, 778 (App. 2009). Indeed, the state "may properly comment on the defendant's failure to present exculpatory evidence which would substantiate defendant's story, as long as it does not constitute a comment on defendant's silence." *Corcoran*, 153 Ariz. at 160, 735 P.2d at 770; *accord State v. Fuller*, 143 Ariz. 571, 575, 694 P.2d 1185, 1189 (1985). Harrison does not contend the prosecutor's questions were a comment on her failure to testify. And, because the alleged error was proper rebuttal to Harrison's cross-examination of the state's witness, we find no abuse of discretion.[8]

[8]As with several of her claims on appeal, Harrison argues this was structural error. However, because we have found no error in the trial court's actions related to those claims, we need not decide whether any errors rise to the level that they deprived Harrison of "'basic protections'" without which "'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.'" *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991), *quoting Rose v. Clark*, 478 U.S. 570, 577-78 (1986).

Sentencing Error

¶45 Harrison contends the trial court violated her constitutional right to be present at sentencing when it provided its reasons for her sentence in its minute entry but not when orally pronouncing the sentence. We review for an abuse of discretion a trial court's imposition of a sentence within the appropriate range, but review constitutional questions de novo. *See State v. Lucas*, 199 Ariz. 366, ¶ 6, 18 P.3d 160, 162 (App. 2001); *State v. Webb*, 164 Ariz. 348, 355, 793 P.2d 105, 112 (App. 1990).

¶46 After a hearing at which both Harrison and the state presented evidence of both aggravating and mitigating factors, the trial court sentenced Harrison to spend her natural life in prison without the possibility of parole. Later that day, the court issued a minute entry ruling explaining its reasons for imposing a natural-life sentence. Those reasons were: Harrison did not suffer from a mental disorder that otherwise would have explained why she killed Mia; she had been raised in a stable household without abuse and knew right from wrong; she expressed no remorse for her actions; and she had planned the murder for days and carried it out even though other reasonable solutions existed to the problems between the roommates. The court concluded that, without evidence of a mental disorder, a history of abuse, or any remorse, Harrison "remains a long-term risk to society."

¶47 Harrison contends "all of the findings provided by the court in its minute entry are questionable" and asserts she could have challenged the findings contemporaneously if given the opportunity. But the appropriate remedy for any alleged error in the process by which the court issued its sentencing findings was to challenge the

findings in a motion to modify her sentence pursuant to Rule 24.3, Ariz. R. Crim. P. Because she failed to do so, we review the issue solely for fundamental error and resulting prejudice. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005).

¶48 Assuming *arguendo* that it was improper for the trial court to articulate its reasons for imposing the sentence in its minute entry rather than in Harrison's presence,[9] we cannot identify how this action prejudiced Harrison. First, the court was not required to set forth its reasons for sentencing Harrison to a natural-life term rather than to life imprisonment with the possibility of parole after a period of years. *See State v. Williams*, 220 Ariz. 331, ¶ 6, 206 P.3d 780, 782 (App. 2008). And, although defendants have an important procedural right to address the court before it imposes sentence, our rules provide no second opportunity once the court has begun its pronouncement of sentence. *See* Ariz. R. Crim. P. 26.10(b). Thus, Harrison had no procedural right to challenge the court's reasons for the sentence it imposed, even if the court had expressed that reasoning in Harrison's presence. Second, although Harrison contends the court's findings are "questionable," she does not contend they are erroneous. Nor did she so contend before the trial court. And, the record supports the court's findings. We thus find no error, constitutional or otherwise.

[9]Although nothing in Rule 26.10, Ariz. R. Crim. P., expressly requires the trial court to articulate its reason for imposing a particular sentence in the presence of the defendant, Rule 26.9, Ariz. R. Crim. P., guarantees a defendant's right to be present at sentencing and at any presentence hearing.

¶49 Harrison also contends the trial court abused its discretion when it sentenced her to imprisonment for her natural life rather than to life imprisonment with the possibility of parole. She concedes our supreme court has decided a natural-life sentence is not aggravated. *See State v. Fell*, 210 Ariz. 554, ¶¶ 14-15, 19, 115 P.3d 594, 598, 600 (2005). It therefore was within the court's discretion to impose such a sentence once it had considered the aggravating and mitigating evidence presented and the victim's family's statements. *See id.* ¶ 20; *see also* 2005 Ariz. Sess. Laws, ch. 325, § 3 (former A.R.S. § 13-703.01(Q)).

¶50 Harrison contends the trial court abused its discretion when it relied on improper aggravating factors, used a mitigating factor in aggravation, and failed to consider all the mitigating factors. The record shows the trial court imposed the sentence after properly considering "factor[s] . . . relevant to the defendant's character or background or to the nature or circumstances of the crime," as provided by law. 2006 Ariz. Sess. Laws, ch. 148, § 1 (former A.R.S. § 13-702(C)(23)). We presume a trial court knows and follows the law and considers all relevant evidence in sentencing a defendant. *See Williams*, 220 Ariz. 331, ¶ 9, 206 P.3d at 783 (presuming court knows and follows law); *State v. Cid*, 181 Ariz. 496, 501, 892 P.2d 216, 221 (App. 1995) (presuming trial court considers all evidence defendant presents in mitigation). Nothing in the record suggests the court here abused its discretion in imposing the natural-life sentence.

Disposition

¶51 Harrison's convictions and sentences are affirmed.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge